



The Comptroller General
of the United States

Washington, D.C. 20548

Kaprit

Decision

Matter of: Nortex Corp.
File: B-224930
Date: January 6, 1987

DIGEST

1. Protest is dismissed where protester is not next in line for award if protest is sustained.
2. Protest against award of purchase orders prior to resolution of size status protest filed with the Small Business Administration is denied in absence of evidence of error in the contracting officer's determination that award without delay was necessary to protect the public interest.--
3. Contracting officer may accept offeror's representation that firm is a small business under oral request for quotations in the absence of evidence indicating the representation is erroneous. Any doubt concerning the firm's size status should be resolved by referral to the Small Business Administration which is empowered by statute to determine conclusively matters of size status and eligibility for federal procurements.

DECISION

Nortex Corp. (Nortex) protests the Army's award of purchase order No. DAHC77-87-M-1068 for rental of a forklift to John's Rental Service (John's) and the award of three purchase orders (No. DAHC77-87-M-1069, -1070, -1071) for rental of a road roller, a loader, and a hoptoe to E & H Equipment and Repair (E&H). The equipment needed for road construction was solicited by request for oral quotations (RFQ) as a small business set-aside.

We dismiss the protest against John's and deny the protest against E&H.

On September 26, 1986, the Army contract specialist solicited oral quotations from 6 firms, including Nortex. On September 27, 1986, the Army ordered the equipment from John's and E&H, the low offerors for each item. On September 29,

Nortex, by telephone, requested the names of the successful offerors. When advised that E&H and Johns had received awards, Nortex orally protested the awards to E&H asserting that since E&H did not have on file with the agency a standard form 129, Bidders' Mailing List Application, certifying E&H as a small business, the firm was ineligible for award under the small business set-aside. Nortex also protested that John's is not a small business eligible for award under the set-aside. Nortex confirmed its protests by letters filed with the Army on September 29. By written determination dated September 29, 1986, the contracting officer found that it was in the best interest of the government to allow the contractors to proceed with the awards because the equipment was urgently required by October 1, to continue the construction of on-going road projects; specifically, unimproved Army roads in Ohau, Hawaii. The Army determined that any delay in obtaining the equipment would cause the suspension of these road projects and increase the cost of these projects. On October 1, 1986, the Army forwarded Nortex's size status protests to the Small Business Administration (SBA) and issued written purchase orders to John's and E&H for rental of the equipment. The record does not indicate whether the SBA has made any decision on Nortex's protests.

Initially, we dismiss Nortex's protest against the award to John's under purchase order No. DAHC77-87-M-1068. Bacon Universal, not Nortex, was the second low offeror under that RFQ. Under our Bid Protest Regulations, 4 C.F.R. § 21.1(a) (1986), a party must be interested in order to have its protest considered by our Office. Determining whether a party is sufficiently interested involves consideration of a party's status in relation to the procurement. See Wing Manufacturing; Simulators Limited, Inc.--Request for Reconsideration, B-213046.3, et al., Aug. 17, 1984, 84-2 C.P.D. ¶ 187. In this regard, we have held that a protester is not interested if it would not be in line for award if its protest were upheld. See Comsel Corp. et al., B-221170.3, et al., Jan. 31, 1986, 86-1 C.P.D. ¶ 115. Since Bacon would be next in line for award if John's was excluded and since Nortex has not protested Bacon's eligibility for award, we have no reason to believe that Nortex would be in line for award if its protest were sustained. Therefore, Nortex is not an interested party to protest the award to John's.

Nortex also protests the Army's acceptance of E&H's oral certification that it is a small business and the decision to proceed with the award without waiting for the SBA's

determination on Nortex's size status protest.^{1/} Specifically, Nortex contends that the Army's justification for award was prepared "after the fact" to support an improper action and that the agency's "carte blanche" determination is "vague, overly broad and could be used in any situation." The protester points out that it submitted a Freedom of Information Act (FOIA) request on October 1, 1986, for "any and all documents, memoranda, or notes authorizing the award. . ." and that in responding to the FOIA request the Army did not furnish the September 29, justification memorandum. Instead, Nortex states that justification was provided to Nortex, for the first time, in the agency's report on this protest. Nortex argues that this suggests that the document did not exist at the time of Nortex's FOIA request and, therefore, consideration of the justification memorandum at this time is improper.

The Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.302 (1985), provides that after receiving a size status protest, the contracting officer shall not award the contract until the SBA has made a size determination or 10 business days have expired since SBA's receipt of the protest, whichever occurs first. However, the award need not be withheld if the contracting officer determines, in writing, that an award must be made to protect the public interest. FAR, 48 C.F.R. § 19.302(h)(1). See Jungor Utility and Paving Co., B-223557, July 15, 1986, 86-2 C.P.D. ¶ 71.

We find that the Army adequately has justified its decision to proceed with the awards to E&H and, therefore, complied with the FAR provision notwithstanding the size protest. The contracting officer concluded that the equipment was urgently needed and that any undue delay would have an adverse impact on on-going construction projects. The Army explains that the equipment leased was needed by the Army's "pavement shop" for on-going repairs of unimproved Army range roads. The Army reports that without this equipment, it would have to suspend its road repair operations. Other than to argue that the Army's rationale for proceeding with the award was too broad or vague, the protester has not attempted to show that the facts supporting the Army's need to make an emergency

^{1/} While Nortex is the third low offeror for the items awarded to E&H, we will consider its protest against the award to E&H since John's is the second low offeror for those items and Nortex, as discussed above, protested John's eligibility for award.

determination in this case are not valid. Under these circumstances, we find that the agency properly could proceed with the award and performance. See REL Incorporated, B-213252, Mar. 27, 1984, 84-1 C.P.D. ¶ 356; What-Mac Contractors, Inc.; Chemical Technology, Inc., B-187053(1), Nov. 19, 1976, 76-2 C.P.D. ¶ 438. While we cannot say from this record why the Army did not furnish a copy of the contracting officer's memorandum of justification to Nortex in response to its FOIA request, we have no reason to question the date stated on the memorandum as the date when it was prepared or otherwise question the memorandum's validity. As discussed above, the record shows a factual basis for justifying award notwithstanding the size protest.

Nortex also objects to the Army's acceptance of E&H's oral representation that it is a small business concern rather than requiring, at a minimum, that E&H have on file a solicitation mailing list application form (standard form 129), which contains a box for indicating size status.

The Army responds that the failure of a firm to have a small business certification on file with the agency does not preclude the agency from soliciting a quotation from that firm. The Army also advises that the contract specialist accepted E&H's oral representation that it is a small business and marked the quote sheets accordingly. The Army further states that the written purchase order for the equipment contains a box for indicating whether or not the quoting firm is a small business and, thus, E&H's written order contained its small business certification.

We do not find that the agency acted improperly by soliciting a quote from E&H because it was not on the bidders mailing list. The FAR, 48 C.F.R. § 13.106, encourages contracting officers to seek maximum practicable competition for small business-small purchase set-asides over \$1,000 such as here. Since oral quotes were solicited, E&H orally certified its size status; that is, there was no bid form on which the firm could certify in writing its size status. The protester, other than to argue that E&H is not a small business because it is not on the bidders mailing list, has provided no evidence indicating that the certification was not made in good faith or is otherwise invalid. In any event, the proper forum for determining the actual size status of a firm representing itself as a small business concern is the SBA which has conclusive authority to determine matters of small business size status for federal procurements. See 15 U.S.C. § 637(b)(6) (1982); Shannon Services, Inc., B-220367.4, Apr. 28, 1986, 86-1 C.P.D. ¶ 411. Further, since the issue of whether a firm is a small business under the

size standards established by the SBA (See 13 C.F.R. § 121.1 et seq. (1985)) relates solely to the firm's status and eligibility for award, it may be resolved after the submission of an offer on the basis of information outside the offer. See Lioncrest Ltd., Inc. B-221026, Feb. 6, 1986, 86-1 C.P.D. ¶ 139; Timberland Paving & Construction Co., B-205179, June 21, 1982, 82-1 C.P.D. ¶ 608.

The protest is dismissed in part and denied in part.

for *Samson Egan*
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